No. 2942

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

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SOUTHERN PACIFIC COMPANY, (a corporation),
Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE WRIGHT and ORA WRIGHT, by GERTRUDE WRIGHT, their Guardian *ad litem,*
Defendants in Error.

ADDITIONAL AUTHORITY CITED BY PLAINTIFF IN ERROR.

In Error to the United States District Court of the Southern District of California, Northern Division.

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Attorneys for Plaintiff in Error.

Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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Since this case was submitted the Supreme Court of the State of California has rendered a decision which is deemed by us to be conclusive of this case. The decision referred to is that of the California Supreme Court, In Bank, in the case of *Mary T. Basham, as administratrix of the estate of O. A. Coffey, deceased, plaintiff and respondent,* vs. *Southern Pacific Company (a corporation), and F. Gehrman, defendants and appellants,* decided October 17, 1917, and reported in The Recorder of October 22, 1917, published in the City and County of San

Francisco. The prevailing opinion in the *Basham* case reads as follows:

> "This action was begun by Eva M. Coffey as administratrix of the estate of her deceased husband, O. A. Coffey, to recover damages caused by the death of her husband, alleged to have been the result of negligence of the defendants. The verdict was given for the plaintiff and the defendants appeal from the judgment.
>
> After the taking of the appeal Eva M. Coffey died, and Mary T. Basham was duly appointed as administratrix of said estate, and she has been substituted as plaintiff herein.
>
> The accident occurred in the city of Merced, on the main track of the Southern Pacific Railroad, at the crossing of R street. The deceased was traveling on R street from the north toward the south, toward said crossing, at the time the train approached the city of Merced. He was in a farm wagon, driving two horses, and leading two others which were hitched to the rear of the wagon bed. The bed was what is called a grain wagon bed, composed of timbers and planks set upon the running gears, and not extending above the wheels. He was sitting about one-third of the way back from the front of the bed, either on a box or on some sacks. The horses were gentle and entirely under control. They were walking at the rate of about three miles an hour. As the train neared the crossing of R street the engineer whistled for the crossing at the usual place. The train had previously been going at very great speed to make up some lost time, having made up nine minutes of the time in the preceding fourteen miles. The track had a very slight down grade at that place, and at a point one mile from the station at Merced the steam had been shut off and the train was running on

its momentum. After shutting off the steam the brakes were applied at intervals to slacken the speed. At a point from eight hundred to one thousand feet from R street the engine whistle was blown for the R street crossing. The fireman was engaged in looking ahead for obstructions upon the track and giving directions to the engineer regarding them; the engineer was managing the machinery of the locomotive and brakes. These were their respective duties. At that time the fireman saw Coffey approaching the track on R street, leaning forward, with the reins in his hands. The fireman said to the engineer, "Blow your whistle; there is a fellow coming over here and I don't know whether he sees us or not." The engineer then gave several sharp, short blasts of the whistle as a warning of danger to attract the attention of Coffey. The train was then proceeding at a speed variously estimated at from fifteen to thirty miles an hour, and its speed was slackening as it proceeded. At the rate of thirty miles an hour it would take eighteen seconds to reach R street. At the time the fireman first saw Coffey, he, Coffey, was about one hundred feet from the main track on which the train was running. He continued to approach the track without increasing his speed, in the same attitude, until the team had reached a point some twenty or thirty feet from the track, and the engine was within about one hundred fifty or two hundred feet from the crossing. Coffey was then giving no sign that he observed the train or that he intended to stop before driving upon the track. That instant the fireman for the first time realized that he might not be aware of the approaching train. He cried to the engineer, "Hold her; that guy ain't going to stop." The engineer immediately applied the emergency brake and stopped the train as quickly as it could be done. Coffey made no move indicating his knowledge

of the approaching train until his horses had stepped upon the track; then, seeing his danger, he arose in the wagon bed, grasped a pitch-fork, and began striking the horses to hurry them up. He failed to get across and the engine struck the rear wheels of the wagon, the collision resulting in his death.

It is not seriously disputed that the engine was running at a rate of speed that amounted to negligence at that point in the city of Merced, nor is it seriously disputed that Coffey was guilty of almost gross negligence in going upon the track without having observed the coming of the train, without stopping to listen for its approach, and without hearing the sharp blasts of the whistle to indicate danger. Admitting negligence by the defendants, it must be also admitted that the negligence of the deceased contributed to the accident, and would prevent a recovery unless it can be said that there was sufficient evidence to sustain a finding that, after the fireman had discovered the approach of Coffey, and had realized that he was probably not intending to stop before going upon the track, or when, as a reasonable man, from the conduct of Coffey, the fireman should have realized that he was either unaware of his danger or indifferent thereto and did not intend to avoid it, the fireman himself neglected to give the signal to the engineer to apply the emergency brake, and that because of this neglect the accident happened.

We do not think it can be said that the evidence is sufficient to prove such negligence by the fireman. It was the duty of Coffey in the exercise of ordinary care, when approaching the railroad track, even at the slow speed at which he was going, to stop and look and listen for the approach of trains. His rate of travel was so slow that it is obvious that he could have stopped

at almost any moment, up to the time when his horses came within the line of travel of the railroad cars, and by so doing have avoided all danger. At the distance of twenty feet from the track, and from that time until he reached it, he could have seen the train if he had simply turned his head in that direction, and could have stopped his team within a very few feet. The fireman had a right to assume that he would stop before reaching the track, until his conduct gave reason to believe that he would not, and until that moment the fireman cannot be said to have been guilty of negligence in failing to call for the emergency brake. When a person is approaching a place of danger, and all the warnings of the danger have been given that reasonable care requires, those in charge of the dangerous engine, seeing him thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue in his approach until he gets into the very place of danger, when it is obvious that he could at any time, with the least care, stop and avoid it. The doctrine of the last clear chance assumes that both the plaintiff and the defendant have been guilty of negligence, the combination of which produces the danger, and places the injured party in a predicament from which he cannot extricate himself, and that this predicament is known, or should be known, with the knowledge actually possessed, to the other party. It is not until this takes place that the duty of additional care devolves upon the person causing the injury. The person thus causing the injury cannot rely upon dullness to excuse him for not knowing that the other party was not aware of danger. He must be held to know this when the circumstances of which he has knowledge are such as would create in the mind of a reasonable man a belief, or a reasonable fear, that the other

party was in such precarious situation. (*Thompson* vs. *Los Angeles, etc., Co.,* 165 Cal. 748; *Harrington* vs. *Los Angeles, etc., Co.,* 140 Cal. 523; *Everett* vs. *Los Angeles, etc., Co.,* 115 Cal. 125.) The persons thus operating a train have the right to presume that the other party will exercise his faculties and use reasonable care for his own safety. In *Holmes* vs. *South Pacific, etc., Co.,* 97 Cal. 168, the facts were that, as the train approached, the injured person was walking alongside of the track, and very close thereto. Just before it reached him, the alarm whistle was sounded, and he stepped upon the track and was killed. The bell was ringing all the time. The court said that the persons in charge of the train were not guilty of negligence in not sooner sounding the alarm whistle, and that, 'as the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself,—as he was in fact,—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct for self-preservation, move away from the track before being overtaken by the engine.' And with respect to the last clear chance, the court said (p. 170), 'The defendant was not the only one who could have prevented the accident, but, on the contrary, if the deceased had himself used ordinary care at the time, he could not possibly have been harmed by defendant's locomotive, which was confined to the narrow track upon which it ran. Up to the very moment that he was struck by the engine it was within his power to escape the injury which he received, by simply moving to a place of safety upon the sidewalk, and he would have realized the necessity for such action on his part but for his own negligence at the time in not looking or listening for the approach of the train.' Upon the facts, the court applied the principle that the doctrine of the last clear chance

'cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them.'

In *Green* vs. *Los Angeles, etc., Co.,* 143 Cal. 31, the injured person was walking along a path which ran across the track, and was approaching the track thereon at the time the defendant's locomotive came along. The path crossed the track at an angle of thirty degrees, and her course was on the path in the direction which caused her face to be turned partly away from the approaching train. The court says that the findings in effect declare, 'that the engineer saw Bessie Green approaching the track along a path which crossed it; that she gave no evidence of knowledge of the approach of the train; and that, notwithstanding such fact, the engineer did not slacken or lessen the speed of the train, or attempt to give said Bessie Green warning of his approach.

'But during all this time, it will be observed, Bessie Green was in a position of absolute safety; she was not upon the defendant's track, but walking upon the pathway approaching it. There was nothing to indicate to the engineer that she would leave that place of safety and put herself in one of danger. The mere fact that she gave no evidence of a knowledge of the approach of the train while walking along the pathway towards the track did not indicate to the engineer that she was about to place herself in a position of peril. It is a matter of common observation that thousands of people daily cross in front of trains and approach crossings for that purpose, without giving any indication that they are aware of the coming of the train. They proceed, determining for themselves whether they have sufficient time to make the crossings safely or not,

solicitous only for their personal safety, and giving no indication to the engineer whether they will hazard the risk of crossing, or pause until the train passes by, or in any manner indicating that they are aware of the approach of the train, or are concerned about it. . . .

'There is nothing to indicate that, as far as the engineer knew or could have known, Bessie Green might not have been perfectly well aware of the approach of the train and still have given no indication or manifestation of that knowledge. The law cast upon her the duty of looking to see, when approaching the point of danger, whether there was a train in sight which might prevent her crossing the track in safety, and the engineer had a right to assume that she had taken the precaution which the law required to insure her own safety, was aware of the situation, and, being in a place of safety, would remain there and not pass to a point of danger.'

The facts in this case are closely similar. Coffey's horses were approaching the train in a slow walk, they were under control, and did not appear to be in the least excited. The train was necessarily making considerable noise; it had just previously given several short, sharp blasts, to indicate danger; it is conceded that the bell was ringing. Coffey could have stopped his horses within four feet of the track without being in danger, and doubtless could have accomplished the stop within a space of two or three feet before reaching that point, and the fireman had the right to assume, until the conduct of Coffey indicated the contrary, that he knew of the approaching train and would stop before driving into its path. The fireman himself testified that 'time and again you will see a team driving along and they pay no attention to your signals. They will come up and stop in the clear of the track

and wait for you to go by.' This testimony accords with what the court says is common knowledge in the quotation just made. There is no evidence to contradict these facts, and no circumstances which throw doubt upon them.

There was, to be sure, some discrepancy in the figures given by the different witnesses regarding the relative locations of the train and the wagon at the moment when the warning signal was first sounded. Such variations in estimates of distances are neither unusual nor surprising. But, giving to the respondents the full benefit of the testimony offered by them, we think the record was not such as to warrant a conclusion that the facts were *materially* different from our statement of them. Granting that the train may have been less than eight hundred feet from the crossing when the warning signal was given, and that the fireman's estimates of Coffey's location were not exactly accurate, it appears from a fair consideration of the entire record, that warning signals were sounded when Coffey was still in a place of safety. The 'last clear chance' doctrine can have no possible application, unless there was evidence tending to show that the fireman neglected to take steps which due care would have required, when he saw the team and wagon in a position which would have indicated to a reasonable man that Coffey was already in danger, or was immediately about to enter the danger zone. The testimony established beyond question that Coffey was guilty of inexcusable want of care in placing himself in peril. The burden of proving that the defendant, after seeing him in such a position, failed to take proper care to avoid injuring him, was on the plaintiff. She seeks to sustain this burden by pointing to the testimony by one or two witnesses, to the effect that the horses were already on the track when the danger signals were blown, and that the train

was then within one hundred fifty or two hundred feet of the crossing. This testimony, vague and uncertain at best, is contradicted not only by that of other witnesses on both sides, but by the inherent probabilities of the situation. Even if it be accepted as sufficient to form the basis of a finding, it does not meet the needs of the plaintiff's case, unless supplemented by evidence that the fireman was at fault in not then doing what a reasonably careful man would have done to avert the impending collision. It is argued to this end that the testimony of the fireman and the engineer shows that the fireman did not call for the application of the emergency brake until some period of time had elapsed after the giving of the warning signal. During this interval, it is said, the fireman failed to take any steps to slow the train so as to permit Coffey to cross in safety. The argument thus made assumes the truthfulness of the fireman's testimony with respect to the directions to the engineer to blow the whistle and apply the brakes. It assumes, on the other hand, that he did not testify truthfully to the conditions existing when he gave the respective orders. The hypothesis is that the brakeman told the engineer, in effect, that a man was approaching the track, and that a whistle should be blown to warn him to stop, when he saw the man already on the track, or so near as to make it plain that he would presently be on it. If the situation was as testified to by the fireman, his statement to the engineer was in accord with the facts, and his conduct was reasonable and intelligible. If the situation was as plaintiff now claims, the fireman's direction to the engineer was obviously futile and meaningless. It would require an unduly strained construction of the evidence to hold that the jury was warranted in accepting the part of the fireman's testimony which described what he did, and rejecting that

part which gave purpose and sense to his actions. Moreover, if the fireman's second warning was so soon after the first, and when the train was so near the crossing as this theory implies, the discovery that Coffey was going to cross the track must have come too late, and when it was made the collision had already become inevitable. The failure to discover it sooner might in that case constitute original negligence, but it would not be a ground for applying the doctrine of the last clear chance. The record convinces us that there is no substantial evidence that the train crew failed to do all that reasonably ought to have been done to avert a collision, as soon as it was, or should have been apparent that the driver was not stopping his team in a place of safety.

With respect to the engineer who was operating the train, and Coffey, the negligently fast speed of the train, and the negligent inattention of Coffey, each contributed to and caused the injury, and each continued actively to that result up to the very moment of the collision, thus bringing the case within the rule stated in *Holmes* vs. *South Pacific, etc., Co., supra.* The plaintiff cannot recover for an injury so caused.

With regard to the last clear chance doctrine, it cannot be said that the fireman was guilty of negligence in failing sooner to realize that Coffey was probably oblivious of his danger. The staccato notes of the danger whistle just then sounded, as the evidence shows, had attracted the attention and aroused the alarm of almost everyone in the vicinity, although none of them had as much need or occasion to be alert thereto as Coffey. The bell of the engine was continuously ringing. The moving train itself must have made considerable noise. The horses were in a slow walk. The lines were in Coffey's hands. The

horses were under his control. He could have come to a standstill in a second. Under all these circumstances it would be extremely unreasonable for anyone to suppose that he was unaware of the approaching train, and did not intend to stop before reaching the track, as he could easily have done, and as is the frequent custom. When the fireman did, nevertheless, begin to entertain a fear that Coffey was inattentive, he at once gave the urgent order to the engineer to stop. It cannot be said either that he did realize the danger sooner, or that, in reason, with his knowledge, he had cause to realize it sooner. Hence the last clear chance doctrine never came into operation, and the case comes within the scope of the case of *Green* vs. *Los Angeles, etc., Co., supra.*

This conclusion renders it unnecessary to determine the other questions presented by the record and argued in the briefs. The evidence was insufficient to support the verdict.

The judgment is reversed."

We respectfully submit that the reasoning of the foregoing opinion, when applied to the facts of the case at bar, shows that as a matter of law both Tucker and Wright were guilty of contributory negligence, preventing a recovery herein, and that the doctrine of "last clear chance" (even assuming that the Court below had not eliminated such doctrine from the case), has no application to the facts of the instant case. These propositions, we think, need no elaboration, the language of the decision itself being sufficiently clear and convincing and demonstrative of the soundness of the position of plaintiff in error.

It is, therefore, respectfully submitted that the judgment herein should be reversed.

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